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# Supreme Court of the United States

HARRISON E. FRYBERGER,  
Plaintiff-Appellant,

*against*

CONSOLIDATED ELECTRIC & GAS COMPANY, a corporation organized and existing under the laws of Delaware, and CENTRAL PUBLIC UTILITY CORPORATION, a corporation organized and existing under the laws of Delaware,

Defendants-Respondents.

October Term  
1943

No. 439

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

In opposition to the petition for a writ of certiorari, and in reply thereto, respondents, Consolidated Electric and Gas Corporation and Central Public Utility Corporation, respectfully show:

### Statement of Facts.

The Plaintiff and his assignors allege that they purchased certain shares of the Class "A" stock of Central Public Service Corporation, a Maryland public utility holding corporation; that they were induced to make these purchases because of false representations made to them by the Central Public Service Corporation and seek

to recover the full purchase price paid for the shares. The Plaintiff first brought a suit in equity in the Supreme Court of the State of New York on or about the 3rd of November, 1933. In that case he sought either a decree for the rescission of the purchase of said shares, or the establishment of his right to recover based upon a rescission in fact. That case was tried before Mr. Justice Lydon without a jury. The trial began on April 22nd and was concluded on May 3, 1935. The Court took the case under advisement and after receiving briefs from both sides made 116 Findings of Fact and 14 Conclusions of Law. Judgment was entered dismissing the complaint on its merits. The respondents were parties to that suit along with three other defendants. One of the important conclusions of law adopted by Mr. Justice Lydon is No. 9 (Rec. 140, fol. 419).

“Plaintiff has not sustained the burden of proving that any of the representations made to him were false.”

That effectually disposed of the plaintiff's claim of a rescission in fact or a right to a decree for rescission. From that judgment dismissing the complaint, the plaintiff appealed to the Appellate Division. That Court affirmed the judgment without opinion. An appeal was taken to the Court of Appeals and that Court dismissed the appeal with an opinion (Rec. 147-150) 273 N. Y. 115.

In the course of its opinion the Court said:

“The gist of his claim is that the judgment granted by the Special Term and unanimously affirmed by the Appellate Division is wrong, and that he has been deprived of his property without due process of law. We are unable to see that there is any constitutional question directly involved on this appeal. Appellant has had his day in court; has had a trial lasting about

nine days, and all issues which the court deemed relevant under the applicable rules of law have been decided by the court in a decision which contains over a hundred findings of fact.

‘It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the State court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States.’ ”

The petitioner then filed a suit in the Chancery Court of the State of Delaware to recover the purchase price of these same shares and annexed to that complaint a copy of the Record in the first New York suit. The Respondents demurred to the complaint and the demurrer was sustained. The Chancellor said, after reviewing the law on *res adjudicata* (Rec. 181-182)

“These principles govern the facts shown here. What are those facts? They are that the complainant filed a suit in equity against Consolidated and Public Utility among others, charging the same identical fraudulent representations as are here charged as having been made to him by Public Service as an inducement to him to purchase the same stock as is here involved, the same repudiation by him of his status as a stockholder and the acquisition by him of the status of a creditor, the same liability of the defendants to respond to him for his claim for deceit practiced against him by Public Service, and the same liability of the defendants’ assets to be burdened with an equitable lien in his favor. The pleadings in the New York case, the evidence adduced at the trial, the court’s findings of fact and law (one hundred and sixteen of the former and fourteen of

the latter), and the decision dismissing the bill after a hearing on the merits are all before this court. They show the complaint there made is identical with the one here made. The opinion of the Court of Appeals found reported in 273 N. Y. 115, describes the bill in New York as one which 'demands an equitable lien on the assets so transferred', which is exactly the demand here made in one of its phrasings.

"After a full and extensive hearing at which a large volume of testimony was taken, the trial court found against the complainant on the fundamental issues. It found that no false representations had been made, that the complainant in his purchases placed no reliance on any representations and that there was no competent evidence to sustain the complainant's theory that Consolidated and Public Utility should respond to the complainant on account of any obligation which the complainant could have enforced against Public Service. The bill was accordingly dismissed. The decree of dismissal was affirmed on appeal. The decree makes brief reference to the court's statement of the facts found and the conclusions of law thereon, and then formally dismisses the bill. Recourse may be had to the formal pleadings, to the issues framed or even to parol evidence, when necessary, to show what questions were submitted and necessarily passed upon by the court in rendering its judgment. *Venetsanos v. Pappas*, supra. It is necessary in this case to refer only to the court's findings of fact and conclusions of law and the decree based thereon, to show very convincingly that what the complainant here seeks to litigate against Consolidated and Public Utility has been fully heard and determined against him elsewhere by a court of competent jurisdiction."

The plaintiff then started this suit against these same respondents in the Supreme Court of New York County.

After trial the Court entered judgment dismissing the complaint. The Court sustained the defense of *res adjudicata* and then adopted all the findings of fact and conclusions of law made by Mr. Justice Lydon in the first New York suit.

As to the defense of *res adjudicata*, the Court said (Rec. 376):

"It appears that this litigation raises issues that have been adjudicated and this court is constrained to adhere under the prevailing circumstances to such adjudication. The specific issues raised herein appear to be within the purview of the prior adjudication and this action appears to be tantamount to allowing a new trial as against these defendants after such an application made on behalf of the plaintiff for a new trial has been judically determined and denied, and this disposition among other matters has been reviewed and affirmed on appeal. Judgment is accordingly awarded to the defendants dismissing the complaint herein."

Mr. Justice McGeehan made the following Findings of Fact and Conclusions of Law (Rec. 428-430):

#### FINDINGS OF FACT.

1. Plaintiff in this action instituted another suit against these defendants and others in the Supreme Court of the State of New York in November, 1933. That case was tried before Mr. Justice Lydon without a jury, commencing on April 22, 1935. It was concluded on May 2, 1935. In his decision Mr. Justice Lydon made one hundred sixteen findings of fact and fourteen conclusions of law and dismissed the complaint on its merits.

2. Plaintiff made a motion for a new trial and that motion was denied.

3. Plaintiff appealed to the Appellate Division and the Appellate Division affirmed both the judgment and the order denying a new trial.

4. Plaintiff then took an appeal as a matter of right to the Court of Appeals and that Court dismissed the appeal.

5. In the prior suit in the Supreme Court plaintiff alleged he and his assignors had been induced to purchase certain shares of the Class A Preferred stock of Central Public Service Corporation by false and fraudulent representations; that he had tendered back the stock and had asked for either a decree of rescission or a decree that he had rescinded in fact, and was entitled to an equitable lien on the assets of Central Public Service Corporation which, he alleged, had been transferred to these defendants.

6. All the pertinent issues in the prior suit in this Court were decided adversely to the plaintiff; that is, it was decreed that he had failed to establish a right to a rescission of his purchase of the Class A stock of Central Public Service Corporation.

7. Plaintiff then instituted a suit in the Chancery Court of the State of Delaware in which he made the same allegations, namely: that he had been induced to purchase this Class A stock of Central Public Service Corporation by fraud; that he had in fact rescinded the purchases, and was entitled to a lien on the assets of these defendants, which, he claimed, had been transferred to them by Central Public Service Corporation. The Chancellor of the State of Delaware in a considered opinion held that the issues involved in the New York suit were the same as those involved in the Delaware suit; that these issues had been decided adversely to the plaintiff, and were a bar to the Delaware suit.

8. Plaintiff offered in this case no evidence that was not before Mr. Justice Lydon in the prior suit in this Court.

#### CONCLUSIONS OF LAW.

##### I.

The issues involved in this suit have all been decided adversely to the plaintiff in the prior suit in the Supreme Court of the State of New York and the suit instituted in the Chancery Court of the State of Delaware, and are a bar to this action.

##### II.

Plaintiff is estopped from trying a second time the issues decided against him in the prior suit in this Court.

##### III.

Plaintiff is estopped from trying here the issues decided against him in the Chancery Court of the State of Delaware.

I therefore direct judgment to be entered in favor of the defendants, Consolidated Electric and Gas Company and Central Public Utility Corporation, and each of them, against the plaintiff, Harris E. Fryberger, dismissing the complaint of the plaintiff as against said defendants, and each of them, with costs to the said defendants to be taxed.

This judgment was affirmed on appeal by the Appellate Division and leave to appeal to the Court of Appeals was denied both by the Appellate Division and the Court of Appeals. Nevertheless an appeal was taken to the Court of Appeals as a matter of right but that appeal was dismissed after argument.



The decision of the Supreme Court of the State of New York involved only questions of law and the application of the rule of *res adjudicata*. The judgment was correct on all issues. All three suits instituted by the petitioner were for the same cause of action, involved the same issues of law and fact, and the respondents were parties defendant in all three suits. The causes of action were merged in the judgments and the petitioner is estopped from litigating again the issues so decided against him.

It is clear that there is involved in this case no question of public importance, no constitutional question and no Federal question. It is respectfully submitted that the petition should be denied.

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